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No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of Columbia Broadcasting Systems, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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September 1983

QUESTIONS PRESENTED

1. Whether there are any special and important questions presented by the petition for writ of certiorari.

2. Whether the Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah correctly precluded the petitioner from relitigating issues in *Olsen v. CBS Musical Instruments*, Civil No. C-77-0013, which the petitioner had previously litigated in *Olsen v. Progressive Music Supply, Inc.*, Civil No. C-75-153.

3. Whether the decisions of the Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah conflict with decisions of this Court or of other federal courts of appeal.

DESIGNATION OF CORPORATE RELATIONSHIPS

CBS Musical Instruments is a division of CBS Inc., a corporation organized under the laws of the State of New York. CBS was formerly named Columbia Broadcasting Systems, Inc. CBS has an interest in the following subsidiaries and affiliates:

Name of Corporation	*State of Corporation*
April Music Inc.	Connecticut
Blackwood Music Inc.	Connecticut
CBS/Black Hawk Cable Communications Corp.	Iowa
CBS/SONY California, Inc.	California
CBS Urban Renewal Corporation	New Jersey
Columbia Recording Corporation	New York
Columbia Television, Inc.	New York

Cruven Inc.	New York
Epic Records, Inc.	New York
5152 Ground Floor, Inc.	New York
Holt-Saunders Inc.	Delaware
Ideal International Ltd.	Delaware
Jare Ventures Inc.	New York
Kiffe Products U.K., Limited	Delaware
Kriven Inc.	New York
Lyon & Healy Harps Inc.	Illinois
MTI Enterprises Inc.	New York
Preference Music Inc.	New York
Priority Music Inc.	New York
Riverfront Redevelopment Corp.	Missouri
Steinway & Sons	New York
Vista Marketing Inc.	New York
Winston Press Inc.	Minnesota

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No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of Columbia Broadcasting Systems, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the order of the United States District Court for the District of Utah is reproduced in Appendix A to the petition for writ of certiorari. The trial court's order granting CBS' motion to dismiss is reproduced in Appendix B to the petition for writ of certiorari. In the interest of brevity, they will not be reproduced herein.

RULES OF THE SUPREME COURT OF THE UNITED STATES

The pertinent Rule of the Rules of the Supreme Court of the United States raised by the CBS Musical Instruments' brief in opposition is Rule 17.1. It is reproduced in its entirety in Appendix A.

STATEMENT OF THE CASE

A. *The Progressive Litigation.*

Clair Olsen and Guitar City Studios, Inc. (collectively referred to as "Olsen"), petitioners herein, originally filed an antitrust action in the United States District Court for the District of Utah in April of 1975 against CBS Musical Instruments ("CBS"), Progressive Music Supply, Inc. ("Progressive") and other manufacturers and sellers of musical instruments and audio equipment, alleging various violations of the antitrust laws, including conspiratorial boycott to prevent Olsen from receiving instruments from CBS and the other named manufacturers. *Olsen v. Progressive Music Supply, Inc.*, Civil No. C-75-153 (*"Progressive"*). Subsequently, in 1975, Olsen voluntarily dismissed CBS from that action without prejudice. The stipulation and order of dismissal are reproduced as Appendix B and incorporated by reference herein. After four years of extensive discovery, the *Progressive* suit was tried to the court for 27 days. The trial court, in amended findings of fact and conclusions of law, found that Progressive and two NON-DEFENDANTS, Mrs. Bobbie Herger ("Herger") and CBS, were involved in a boycott to prevent Olsen from receiving instruments from CBS, and that Progressive and Herger conspired to fix resale

prices on CBS products sold to consumers at the retail stores.[1] Olsen was awarded actual damages for the boycott in the sum of $4,303.00. The court found no damages attributable to the Progressive/Herger conspiracy to fix resale prices on CBS products. *Olsen v. Progressive Music Supply, Inc.*, 1982-2 Trade Cas. ¶ 64,928 (D. Utah 1981). All other claims of Olsen were dismissed. That decision was recently affirmed by the United States Court of Appeals for the Tenth Circuit. 703 F.2d 432 (10th Cir. 1983). Olsen has filed a petition for certiorari in the Supreme Court of the United States, Supreme Court Docket No. 82-2077.

B. *The CBS Litigation.*

On January 17, 1977, Olsen commenced a new action in the United States District Court for the District of Utah against CBS alleging the very same claims that formed the basis for the *Progressive* suit. *Olsen v. CBS Musical Instruments* (*"CBS"*), Civil No. C-77-0013. Olsen candidly admits there is but one single alleged conspiracy involved in both cases. *See*, Brief of Appellants filed in the United States Court of Appeals for the Tenth Circuit at 43 reproduced herein as Appendix C. Because the claims in *CBS* were the same claims made by Olsen in *Progressive*, the parties in *CBS* stipulated to stay *CBS* pending the outcome of *Progressive*, which was recognized by the parties as possibly determinative of *CBS*.

---

[1] The court had initially entered findings of fact and conclusions of law finding no conspiracy or boycott. CBS, of course, was not a party to that action and was not represented by counsel. Further, there was no identity of interests between CBS and any of the named defendants so that CBS would be collaterally estopped from arguing whether it ever unlawfully conspired to boycott Olsen. CBS denies any such involvement.

After the conclusion of *Progressive*, trial of *CBS* was set for October 18, 1982. On October 12, 1982, CBS filed a motion *in limine* requesting that the trial court limit Olsen's proof of damages to the damages found in *Progressive*. On October 15, 1982, at the argument on the motion *in limine*, CBS moved to dismiss the action on the grounds that (1) Olsen would be limited to the amount of damages he has been able to prove in the *Progressive* case, and (2) an award of the same damages against CBS that were awarded against Progressive would amount to a double recovery. After considering the arguments of counsel and the memoranda, Judge Winder granted CBS' motion to dismiss on the grounds that Olsen had already litigated and been awarded damages in *Progressive* for the very same combination and conspiracy alleged in *CBS*, and therefore, Olsen was collaterally estopped from relitigating that damage claim in *CBS*. Appendix B to Olsen's petition for certiorari.

On November 8, 1982, Olsen filed a notice of appeal of the trial court's decision with the United States Court of Appeals for the Tenth Circuit. In response to Olsen's appeal, on April 25, 1983, CBS filed a motion to affirm. The CBS motion to affirm was granted by the United States Court of Appeals for the Tenth Circuit on May 12, 1983. Appendix A to Olsen's petition for certiorari.

SUMMARY OF ARGUMENT

Olsen's petition for certiorari represents still another, and hopefully final, attempt to relitigate issues in *CBS*, which were previously fully and fairly litigated in *Pro-*

gressive. Contrary to Olsen's misrepresentations to the Court, this case does not present any antitrust or constitutional issues. Rather, Olsen again merely seeks review of a straightforward application of defensive collateral estoppel by the district court as summarily affirmed by the United States Court of Appeals for the Tenth Circuit. Olsen's petition argues points that are inaccurate, moot and totally irrelevant, and presents nothing that merits this Court's attention. Consequently, as with Olsen's appeal, this petition should be summarily denied.

ARGUMENT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

Rule 17.1 of the Rules of the Supreme Court of the United States states: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In this case there are no reasons for granting the writ, special, important or otherwise. Nothing in Olsen's petition raises an issue rising to the level of importance required for this Court's review.

Olsen asserts three grounds in support of his petition for writ of certiorari. Point III attempts to argue that the trial judge in *Progressive* committed error with regard to Olsen's unfair competition claim. Since CBS was *not* a party or a participant in the *Progressive* action, Point III is irrelevant to Olsen's petition for writ of

certiorari in *CBS*. The ridiculous nature of this claim is further highlighted by the fact that the unfair competition claim was *not* advanced by Olsen in *CBS*. Accordingly, CBS need not address Olsen's Point III.

In Point II, Olsen also attempts to impose on CBS the findings in *Progressive*, a case in which CBS was not a party or a participant. Olsen's position is clearly contrary to the well-established principles of due process. Since CBS was neither a party nor a participant to the *Progressive* action it is not bound by any determination therein. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

Moreover, Olsen has already been awarded its actual damages of $4,303.00, trebled to $12,909.00 from Progressive for the alleged conspiracy. Bond has been posted to secure full payment of that judgment. Consequently, it is clear that Olsen will receive full satisfaction for the alleged injury in *CBS*. This issue, although without merit, is now moot. There is therefore no reason, substantial and important or otherwise, why this Court should review the appellate court's decision which summarily affirmed the trial court's decision. As with Point III, there is no merit to Olsen's Point II.

Finally, Olsen's Point I argues whether petitioners, having once had a full and fair opportunity to litigate the subject damage claims in *Progressive*, were entitled to relitigate those same claims against CBS in another proceeding. The answer to this elementary question of civil procedure would be easily answered by any first-year law stu-

dent. Application of the doctrine of collateral estoppel, as in the instant case, is neither novel nor contrary to established principles of federal procedure, and simply does not present the special, important kind of issue necessary to justify the exercise of this Court's valuable resources. Olsen's final attempt to reargue issues already determined with a view toward a better result falls woefully short.

II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY PRECLUDED OLSEN FROM RELITIGATING.

Olsen contends that despite the fact that both *CBS* and *Progressive* involved a single common conspiracy, and despite four years of extensive discovery of that claim and a 27-day trial of it, he was entitled to re-try that same claim with new and different evidence of damages against CBS in another proceeding. The trial court in *CBS* properly ruled that there was simply nothing new to litigate. Furthermore, regardless to Olsen's theory of damages, the damages that Olsen suffered as a result of the acts alleged in *CBS* would have to be the same damages that Olsen suffered as a result of the acts alleged in *Progressive*, because according to Olsen, they result from the very same conspiracy. Appendix C. The transcript of the hearing on CBS' motion *in limine* and motion to dismiss conclusively demonstrate the correctness of the district court's ruling:

> THE COURT: Wasn't the whole point of that case [*Progressive*] that CBS and Herger and mainly Progressive — and possibly others — conspired to do about the same kind of things that are done here?

MR. WELLS: Sure and if we had had CBS in that case we could have gotten the whole thing resolved. Unfortunately, we didn't. I think the law is clear that we can go against them. They produced some of the wrong. If we can prove additional damages, we are entitled to recover.

* * *

THE COURT: What is outside of what I have just quoted to you? I can read you his Conclusion of Law. [In *Progressive.*]

MR. WELLS: I have read that, Your Honor.

THE COURT: I'm sure you have. Isn't that exactly what we are trying here is a Sherman I claim involving a conspiracy to restrain trade among Herger, Progressive and CBS?

MR. WELLS: And others.

THE COURT: What others?

MR. WELLS: Well, I think Leo's and some of these that went along with that are — could be found to be co-conspirators, arguably.

THE COURT: How does the damage get greater because Leo's is involved or Melody is involved? That is what Judge Anderson found is what damage they suffered. He found a Sherman I violation. He concluded that was the damage they suffered. CBS was part of that conspiracy. So, how do you — what are we doing here having a jury decide again what the damages are?

MR. WELLS: Your Honor, we are entitled to put on additional evidence to show that the damages were in fact greater than were found in that case. It is the same as having a new witness on damages. And we are not bound as to CBS by that ruling.

* * *

> THE COURT: Other than the Statute of Limitations that is different in the two cases, and I can see maybe from that proving differently. But there isn't anything in this case that CBS is alleged to have done that Progressive wasn't its coconspirator at the same time and vice versa, isn't that so?
>
> MR. CLAWSON: I believe that is so. I'm not fully advised of the Progressive case. I wasn't involved in that case at all.
>
> Transcript of Proceeding, October 15, 1982, pgs. 26-40, reproduced in Appendix D.

In an attempt to avoid his proof of actual damages of only $4,303.00, Olsen argues that the lower court erred in dismissing the case under the doctrine of collateral estoppel because mutuality did not exist between the parties. (Olsen's Petition at page 7.) Obviously, Olsen fundamentally misunderstands the doctrine of collateral estoppel. The application of defensive collateral estoppel in *CBS* to avoid relitigation of issues previously fully and fairly litigated by Olsen in *Progressive* was neither inconsistent with prior decisions of this Court nor decisions of other federal appellate and district courts. The defensive use of collateral estoppel by a nonparty to the prior litigation is well-settled and has been specifically approved by this Court. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra. See also, Cramer v. General Telephone & Electronics Corporation*, 582 F.2d 259, 267 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Rutledge v. Boston Woven Hose & Rubber Company*, 576 F.2d 248, 249 (9th Cir. 1978); *Brown v. DeLayo*, 498 F.2d 1173, 1175-76 (10th Cir. 1974).

Olsen's misunderstanding of collateral estoppel is further evidenced by his reliance upon *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979) and *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955). *Parklane Hosiery* involved the *offensive* use of collateral estoppel by stockholders in their claim against the defendant corporation for violation of federal securities laws in issuing a materially false and misleading proxy statement in connection with a merger. The stockholders sought to use a prior judgment obtained by the SEC, finding the same proxy statement to be materially false and misleading against the defendant Parklane Hosiery. *Parklane Hosiery*, therefore, involved the opposite situation from that in the instant action. While inapplicable here, the court's sanctioning of the use of offensive collateral estoppel by a non-party to the prior litigation (under certain circumstances) lends further support to the viability of the doctrine of collateral estoppel. Moreover, it is clear that it is a general doctrine applicable to controversies of all kinds, including antitrust.

Similarly, plaintiffs' reliance on *Lawlor v. National Screen Service Corporation, supra*, a case involving the applicability of the doctrine of *res judicata*, a totally different and distinct principle from collateral estoppel, is equally misplaced. In *Lawlor*, defendant National Screen argued that plaintiff Lawlor was barred from bringing the action by the doctrine of *res judicata* as a result of a prior lawsuit involving the parties which was dismissed with prejudice. There the court noted the distinction between *res judicata* and collateral estoppel stating:

> Thus, under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.' *Id.* at 326-27. (Citation omitted.)

Unlike *Lawlor*, in *CBS*, the trial court based its decision on the detailed amended findings of fact in *Progressive*, which in turn were based upon four years of extensive discovery and 27 days of trial. Olsen had every motive and opportunity to litigate fully the issue of damages which resulted from the alleged conspiracy. Tacitly admitting that the issues in *CBS* and *Progressive* are identical, Olsen argues that it is not collaterally estopped because the issues were not fully and fairly determined in *Progressive*. The record in *Progressive* described above demonstrates otherwise. Despite numerous appeals, no error has been found in that case. Moreover, in *CBS*, Olsen never claimed *Progressive* was not fully or fairly determined. It is well-settled that an objection may not be raised for the first time on appeal. *Neu v. Grant*, 548 F.2d 281, 286-87 (10th Cir. 1977); *Baker v. Sherwood Construction Co.*, 409 F.2d 194, 195 (10th Cir. 1969); *Community National Life Insurance*

Co. v. Parker Square Savings & Loan Assn., 406 F.2d 603, 606 (10th Cir. 1969). For all of the foregoing reasons, this claim was easily dismissed by the appellate Court.

Finally, Olsen's claimed denial of constitutional rights is utterly unintelligible.

III. THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH DO NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR OTHER FEDERAL APPELLATE OR DISTRICT COURTS.

Contrary to Olsen's misstatements, the decision of the *CBS* trial court as affirmed by the Tenth Circuit was nothing more than the routine application of defensive collateral estoppel. Olsen's disingenuous and inadequate attempt to manufacture a conflict constitutes either a serious misunderstanding of the law or an extreme lack of candor with the Court.

CONCLUSION

For all of the foregoing reasons, CBS Musical Instruments respectfully requests that this Court deny Olsen's petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

DATED this 8th day of September, 1983.

Respectfully submitted,

GIAUQUE & WILLIAMS
Richard W. Giauque
Gary F. Bendinger
Counsel of record

Scott A. Call
500 Kearns Building
Salt Lake City, Utah 84101

By .....
Attorneys for Respondent
CBS Musical Instruments

AFFIDAVIT OF SERVICE

On behalf of CBS Musical Instruments and pursuant to Rules 28.2, 28.3 and 28.5(c), I have caused 40 copies of this Brief in Opposition to be mailed to the Clerk of the Supreme Court, and I have caused three copies of this Brief in Opposition to be served by mail upon:

Lowell Summerhays, Esq.
Edward T. Wells, Esq.
SUMMERHAYS, WELLS & CLAWSON
420 Continental Bank Building
Salt Lake City, Utah 84101

counsel of record for Clair Olsen and Guitar City Studios, Inc., petitioners. These documents were deposited in a United States mailbox, with first-class postage prepaid, this 8th day of September, 1983.

To my knowledge this mailing is within the time permitted for filing this brief in opposition. All parties required to be served have been served.

GIAUQUE & WILLIAMS
Richard W. Giauque
Gary F. Bendinger
Counsel of record

Scott A. Call
500 Kearns Building
Salt Lake City, Utah 84101
(801) 533-8383

By .....
Attorneys for Respondent
CBS Musical Instruments

Subscribed and sworn to before me this 8 day of September, 1983.

Notary Public
Residing SLC, Utah

My Commission Expires: 4-11-85

APPENDIX A

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 75-153

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Plaintiffs,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., ACOUSTIC CONTROL CORPORATION, OVATION INSTRUMENTS, INC., NORLIN MUSIC INC., formerly CHICAGO MUSICAL INSTRUMENT COMPANY, CBS MUSICAL INSTRUMENTS, a division of COLUMBIA BROADCASTING SYSTEM, INC., ARP INSTRUMENTS, INC., and PEAVEY ELECTRONICS CORPORATION,

Defendants.

STIPULATION OF DISMISSAL AS TO DEFENDANT CBS MUSICAL INSTRUMENTS a division of CBS Inc.

Pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure it is hereby stipulated that the plaintiff may, and by this Stipulation of Dismissal does, hereby dismiss this action and the Complaint and Amended Complaint herein as to the defendant CBS Musical Instruments a division of CBS Inc., this dismissal being without prejudice and without costs to either party. This dismissal is as to said defendant CBS Musical Instruments a division

of CBS Inc. only and plaintiff reserves its rights as to remaining defendants in this case.

DATED this 17th day of November, 1975.

LOWELL V. SUMMERHAYS, INC.
By Lowell V. Summerhays
Attorney for Plaintiffs

CHRISTENSEN, GARDINER, JENSEN & EVANS
By L. R. Gardiner, Jr.
Attorney for Defendant CBS Musical Instruments, a division of CBS, Inc.

VAN COTT, BAGLEY, CORNWELL & McCARTHY

By E. Scott Savage
Attorney for Defendant Ovation Instruments, Inc.

By Stephen G. Crockett
Attorney for Defendants Progressive Music Supply, Inc., Acoustic Control Corporation, Peavey Electronics Corporation

By Bryce E. Roe
Attorney for Defendant Norlin Music Inc., formerly Chicago Musical Instrument Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

ORDER OF DISMISSAL
C 75-153

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Plaintiffs,

v.

PROGRESSIVE MUSIC SUPPLY, INC., et al.,

Defendants.

On November 20, 1975, the parties in the above-entitled case filed a stipulation of dismissal. The stipulation was designed to dismiss CBS Musical Instruments, a division of CBS, Inc., from the case without prejudice and without costs to either party. The stipulation specifically reserved the plaintiffs' rights against the remaining defendants.

IT IS HEREBY ORDERED that defendant CBS Musical Instruments is dismissed from this case without prejudice and without costs.

DATED this 11th day of December, 1975.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

TENTH CIRCUIT

Appellate Court Number 82-2398

APPELLANTS BRIEF

District Court No. C77-0013W

District of Utah Central Division

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation

Plaintiffs,

vs.

CBS FENDER, division of the COLUMBIA BROADCASTING SYSTEMS, INC.

Defendants.

Lowell V. Summerhays, W. Andrew Clawson, and Edward T. Wells of the Firm of SUMMERHAYS RUNYAN & McLELLAND, Attorneys for Plaintiffs Appellant, 420 Continental Bank Building, Salt Lake City, Utah 84101, Telephone (801) 355-5200.

Lowell V. Summerhays, W. Andrew Clawson, and Edward T. Wells, attorneys for Plaintiffs Appellant, herewith respectfully submits the following appeal brief.

POINT IX

FOR JUDICIAL EFFICIENCY THE CBS AND THE PROGRESSIVE CASES SHOULD BE CONSOLIDATED AT THE APPELLATE LEVEL

The CBS and the Progressive case should be consolidated at the appellate level for decision for the following reasons:

1. There is only one conspiracy common to both the CBS and Progressive case. This is supported by the undisputed evidence. See Exhibit "C" attached, where CBS has been named and proved to be a co-conspirator, having been formerly a Defendant in the Progressive case. Examination of the complaint in the CBS case clearly shows that Appellants have alleged an on going continuation of the proven Progressive case conspiracy.

2. It would be a waste of resources for all the parties to have the issues in the two (2) cases decided separately. This is so because Appellants believe errors exist in both cases that will require new trials and different levels of liability. Neither case can be properly resolved until the errors in both cases are resolved. The purpose of Appellate decisions based on final orders is to prevent dealing with the issues in a piece meal fashion. See *Riegal Fiber Corporation v. Anderson Gin Company*, 512 F.2d 784, at 793, n. 19 (5th Cir. 1975), *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 4; *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336, at 1340, (5th Cir. 1969). These cases deal with consolidation of the issues based on F.R.C.P. 41 (b), which is an issue in the Progressive case. While the dismissal of CBS was

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

BEFORE: THE HONORABLE DAVID K. WINDER

CLAIR OLSEN,

Plaintiff,

vs.

CBS MUSICAL INSTRUMENTS, et al.,

Defendant.

C 77-13

REPORTER'S TRANSCRIPT

October 15, 1982

APPEARANCES OF COUNSEL:

For Plaintiff: EDWARD T. WELLS, ESQ.
ANDREW CLAWSON, ESQ.

For Defendant: RICHARD GIAUQUE, ESQ.
GARY BENDINGER, ESQ.

SHIRLYN SHARPE, RPR
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Tel: 355-5797

THE COURT: Wasn't the whole point of that case that CBS and Herger and mainly Progressive — and possibly others — conspired to do about the same kind of things that are done here?

MR. WELLS: Sure and if we had had CBS in that case we could have gotten the whole thing resolved. Unfortunately, we didn't. I think the law is clear that we can go against them. They produced some of the wrong. If we can prove additional damages, we are entitled to recover.

THE COURT: What about the 4,000-plus that was awarded over there before trebling? What happens if you get a judgment here? Is that subtracted or is the jury told here about what you got in the Progressive case?

MR. WELLS: I don't believe so, Your Honor.

THE COURT: There is going to be a duplication.

MR. WELLS: In the event there is a duplication, I would expect they would be entitled to an offset. But I'm not so sure there will be a duplication.

MR. GIAUQUE: May I be heard briefly?

THE COURT: Yes.

MR. GIAUQUE: This is the part of the record that I have paid attention to and I have gone over it line by line what occurred in Progressive. The state of the record is as follows: Clair Olsen was asked whether there was a period of time in which he felt that his supply of CBS instruments

MR. WELLS: I have read that, Your Honor.

THE COURT: I'm sure you have. Isn't that exactly what we are trying here is a Sherman I claim involving a conspiracy to restrain trade among Herger, Progressive and CBS?

MR. WELLS: And others.

THE COURT: What others?

MR. WELLS: Well, I think Leo's and some of these that went along with that are — could be found to be co-conspirators, arguably.

THE COURT: How does the damage get greater because Leo's is involved or Melody is involved? That is what Judge Anderson found is what damage they suffered. He found a Sherman I violation. He concluded that was the damage they suffered. CBS was part of that conspiracy. So, how do you — what are we doing here having a jury decide again what the damages are?

MR. WELLS: Your Honor, we are entitled to put on additional evidence to show that the damages were in fact greater than were found in that case. It is the same as having a new witness on damages. And we are not bound as to CBS by that ruling.

THE COURT: Mr. Wells, I'm worried about my earlier ruling, but I'm not the slightest bit convinced by what you just said. I don't believe for a minute that you can

lot different that what was established in that case. The theories are Frank Stuart's and not mine. I can't speak for him. That evidence will be in that trial from his testimony.

THE COURT: Other than the Statute of Limitations that is different in the two cases, and I can see maybe from that proving differently. But there isn't anything in this case that CBS is alleged to have done that Progressive wasn't its co-conspirator at the same time and vice versa, isn't that so?

MR. CLAWSON: I believe that is so. I'm not fully advised of the Progressive case. I wasn't involved in that case at all.

THE COURT: There isn't anything you are entitled to damages for as against Progressive that you wouldn't be entitled to damages for as against CBS, is there?

MR. WELLS: Your Honor, I think that there may be an element in Mr. Stuart's calculations. And again, I can't testify for him. But I — my understanding is that there are — there are differences in the damages that flow to CBS than those that flow to Progressive. And because CBS was not there and I don't know if — you know, I can't quote the findings of Judge Anderson. And I don't have an express recollection of whether or not that issue was addressed. But as to whether or not Progressive may have come out of that conspiracy prior to the time that CBS advised the dealers that